United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1059

B Pfs

To be argued by
PETER A. CLARK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1059

UNITED STATES OF AMERICA,
Appellee,

—v.—

THOMAS JOSEPH HERMANN
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Statement of the Case

This is an appeal from a judgment of the Court (Clarie, *C.J.*) denying Appellant Hermann's motion made pursuant to 28 U.S.C. § 2255 seeking to vacate a sentence imposed for armed bank robbery. Hermann was convicted on May 13, 1971 following his plea of guilty to a violation of 18 U.S.C. § 2113(a). He was sentenced on September 27, 1971, to a term of eleven years to run consecutive to a term he was then serving in state custody. On December 20, 1971, his motion to reduce sentence was denied. The instant motion was filed on October 28, 1974. A hearing was held on December 9, 1974, and the motion was denied in a memorandum ruling on January 3, 1975. This appeal followed.

Statutes Involved

28 U.S.C. § 2255

A prisoner under sentence of a court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Rule 11, Federal Rules of Criminal Procedure

A defendant may plead not guilty, guilty, or with the consent of the court, nolo contendere. The court . . . shall not accept such plea [guilty] . . . without first addressing the defendant personally and determining that the plea is made . . . with understanding of . . . the consequences of the plea. . .

18 U.S.C. § 3568

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary. . .

Questions Presented

I. Did the Court, after affording appellant a hearing in which to explain or contest information in the presentence report, subsequent to which it made specific findings that allegedly uncounselled prior convictions had in no way influenced the original sentence and that said sentence was fair and just, err in denying appellant's motion to vacate and correct sentence?

II. Must appellant's guilty plea be vacated on the grounds that it did not meet the requirements of Rule 11, F.R.C.P.?

A. Can appellant raise for the first time on appeal from the district court's denial of a motion made pursuant to 28 U.S.C. § 2255 the claim that his guilty plea was entered without full knowledge of the consequences of said plea?

B. Assuming arguendo that the Appellate Court can rule on the merits of a Rule 11, F.R.C.P. claim raised for the first time on appeal, does Rule 11 require a Court to advise a federal prisoner before accepting his guilty plea that it cannot make a federal sentence concurrent to a state sentence which has been imposed on an unrelated matter?

Statement of Facts

A. The Guilty Plea

On October 29, 1970, appellant Hermann and one George Buchanan were indicted for the August 14, 1970 armed robbery of the Georgetown branch of the Union Trust Company. On May 11, 1971, co-defendant Buchanan pleaded guilty to count one of the indictment (18 U.S.C. § 2113(a)) and was sentenced on July 26, 1971 (Zampano, *J.*) to a term of eleven years (App. 3a). Between the arrest and plea in the case at Bar, appellant pleaded guilty to unrelated state charges for which he received a five to seven year sentence. Appellant entered a guilty plea on May 13, 1971 in the District Court to the same count as Buchanan and received an identical eleven year sentence (Clarie, *C.J.*) on September 27, 1971 (App. 3a, 15a). The sentencing Court indicated at disposition that Hermann's sentence was to run consecutive to the state sentence (App. 32a).

At the time the guilty plea in this matter was entered, appellant was a Federal prisoner awaiting trial, having been unable to post his bond (App. 14a). Immediately

after entry of the plea, Hermann's counsel advised the Court of the intervening state sentence and requested that he be released from Federal custody to begin serving the state sentence (App. 15a). This was granted and the state assumed custody for Hermann to begin serving that term (App. 16a). When returned to Court for sentencing he was, as a result of his own motion, a state prisoner. He completed the state term and began serving the federal term on January 4, 1975.

B. The Presentence Report

Between plea and sentence the customary pre-sentence report was prepared by the United States Probation Office. Contained therein was a summary of prior offenses, including: two juvenile references at ages fourteen and sixteen; a larceny conviction in Bergen County, New Jersey, 1963; trespassing, 1964; manslaughter, 1964; false statement to the F.B.I., 1964; attempted breaking and entering, 1969; sale of narcotics, 1970; and probation violation, 1971 (App. 20a-22a). A 1962 North Carolina conviction for breaking and entering was also referred to under the Military Service section of the report (App. 25a).

During allocution, appellant's counsel argued that Hermann and co-defendant Buchanan were "equally culpable" (App. 29a) and asked the Court to consider a sentence similar to that received by Buchanan from another judge (App. 29a-30a). Counsel also asked that the sentence be made concurrent with the state term (App. 30a). In its remarks the Court summarized Hermann's record, omitting reference to the North Carolina conviction but including the trespassing conviction (App. 31a). The Court then stated its agreement with equal punishment and awarded the eleven year sentence (App. 32a).

In December, 1971 appellant moved in District Court for a reduction of sentence. The sentencing Court indicated

at that time that he had initially been inclined to impose more than eleven years; however, because Buchanan had received this term and Hermann had state time to serve, he reduced his original intentions (App. 38a-39a).

Appellant next moved via the instant motion to vacate and correct his sentence, alleging that two prior convictions (North Carolina, breaking and entering, 1962; and trespassing, 1964) were constitutionally invalid under *Gideon v. Wainwright*, 372 U.S. 335 (1963) and that the Court improperly considered them in assessing sentence. Appellant further contends that other aspects of the pre-sentence report were factually inaccurate, those being: the circumstances of his manslaughter offense and his 1963 New Jersey larceny conviction, and; his family background. At the hearing on this motion on December 9, 1974, appellant testified, with regard to the Gideon claim, that in the two cases of which he complains he was indigent and that counsel was not appointed (App. 63a-66a). He further testified that the incident culminating in his manslaughter conviction was not, as passing reference was made in the presentence report, a narcotics transaction, but rather a shooting of someone entering his home (App. 67a, 68a). Finally, with respect to the New Jersey larceny conviction, he testified that his guilty plea was part of a "package deal" with his co-defendants and that he was not criminally responsible (App. 69a-71a). Appellant also presented the testimony of his mother, who described appellant's poor relationship with his father and other aspects of their family life (App. 76a-87a). The Government presented no evidence.

On January 3, 1975 the Court denied the motion to vacate in a written ruling, in which he made the finding that the convictions claimed to be uncounselled were "comparatively inconsequential in his overall record and, in fact, had no material bearing on the ultimate sentence imposed" (App. 100a-101a). The Court further found that the sentence was "fair and just" (App. 101a).

Appellant also raises for the first time on appeal the claim that his guilty plea was not knowledgeably made because the Court did not inform him of the fact that it was powerless to make the federal sentence concurrent with the state sentence. This claim was neither alleged in the moving papers nor argued at the hearing below.

ARGUMENT

I.

The Court, by virtue of the full fledged hearing accorded appellant followed by a clear statement that any allegedly uncounselled convictions in his record did not influence his sentence, which, under all of the circumstances including new claims is fair and just, has already granted appellant any relief to which he may be entitled and therefore properly denied his motion to vacate.

The typical relief in cases where uncounselled convictions are later brought to light is to inquire of the District Court whether the challenged convictions actually affected the sentence, or whether, assuming they are invalid, the original sentence was proper. See *Ferranto* v. *United States*, 507 F.2d 408 (2 Cir.) 1974; *Gandy* v. *United States*, 502 F.2d 564 (5 Cir.) 1974; *Wilsey* v. *United States*, 496 F.2d 619 (2 Cir.) 1974; *Baker* v. *United States*, 494 F.2d 508 (5 Cir.) 1974; *United States* v. *Sawaya*, 486 F.2d 890 (1 Cir.) 1973 and the cases cited therein at 893. The sentencing judge has already done this by clearly stating in his post-hearing ruling that the challenged convictions did not affect the sentence and, for reasons enumerated therein, is still of the opinion that the sentence is proper. Hermann was the robber who wielded the gun. He had, aside from the challenged convictions, a lengthy prior record including manslaughter. His co-defendant received the same sentence

from a different judge, which Judge Clarie indicated influenced him to *reduce* what he originally felt was proper for Hermann. The action taken is thus more than sufficient. It would serve little purpose to remand to duplicate what has already been done with respect to the uncounselled convictions.

Appellant also challenges other aspects of the presentence report which he characterizes as material false assumptions upon which the sentencing judge relied. The cumulative weight of these arguments is at best unpersuasive. He disputes that his manslaughter conviction arose from a narcotics transaction. While the presentence report indicates that this was the police claim (App. 21a), the same paragraph contains Hermann's version of the offense which he also testified to at the hearing. The prime concern to the sentencing judge was certainly not the details of the various versions, but rather the glaring fact that appellant, as a man previously convicted of the unlawful killing of another is in the instant offense employing a gun against bank tellers.

Appellant also contends that his involvement in a 1963 larceny conviction is substantially less culpable than reported. Nevertheless, he did enter a guilty plea to a criminal charge where he was represented by counsel. As the Court noted, "We can't try . . . cases back all over the United States" (App. 56a).

Finally, appellant quibbles with the sentencing court's remark that Hermann "came apparently from a good family" (App. 31a), whereas both the presentence report and the testimony of his mother indicate that his father treated him harshly. It is a semantic argument wholly without merit. The presentence report, with which the Court was thoroughly familiar, accurately depicted appellant's family life as conceded by counsel himself when he stated that "Mr. Hermann's background . . . was reviewed by the Probation Department and they have done . . .

an exemplary job in every instance" (App. 92a). The Court's reference to an apparent good family is inconsequential.

The sentencing process is surely not bound by the technical requisites of a trial. Here the alleged shortcomings do not constitute the "combination of procedural irregularities, confusion, misunderstanding and misinformation," *United States* v. *Malcolm*, 432 F.2d 809, 819 (2 Cir.) 1970, nor are they so grossly damaging, *United States* v. *Weston*, 448 F.2d 626 (9 Cir.) 1971, as to be a denial of due process requiring a vacation of sentence. Finally, there was not a complete denial of the opportunity to present rebuttal information for the Court's consideration. A full hearing was held at which Hermann was encouraged to raise anything "that counsel hasn't brought out which you want to bring out" (App. 75a). After considering all of this information, the Court was of the opinion that the sentence was appropriate. Clearly it was. Under all the circumstances, the District Court's denial of the motion was proper.

IIA.

Appellant cannot raise for the first time on appeal the claim that his guilty plea was not entered without full knowledge of the consequences of said plea.

Neither in appellant's moving papers nor in the hearing on his petition during which time he has been continuously represented by counsel, was the Rule 11, F.R.C.P. issue ever alluded to. The argument first appears in his appellate brief. Consideration of the merits is thus procedurally barred. *Fields* v. *United States*, 438 F.2d 205 (2 Cir.) 1971. Appellant's reliance on *Ferranto* v. *United States*, *supra*, for the proposition that matters not raised below may be considered on appeal is misplaced. Not

only was petitioner there pro-se, but the opinion addressed itself to the question of matters not raised in *previous* petitions. The issue on appeal in *Ferranto* was included in the petition to the District Court. It simply was not adjudicated because of the summary denial.

Furthermore, while appellant claims that there is no dispute of fact regarding his status at the time of plea, this is not the case. Appellee contends that he was a federal, as opposed to state, prisoner when his plea was entered.

IIB.

Assuming arguendo that the Appellate Court can address the merits of an issue raised for the first time on appeal, Rule 11, F.R.C.P. does not require that a Court accepting a guilty plea from a federal prisoner advise him that his federal sentence may not be made to run concurrent with a state sentence that has been imposed but has not commenced.

Appellant's whole argument is founded on the mistaken premise that he was a state prisoner at the time of his guilty plea. He was, in fact, a federal prisoner held for trial because he could not post bond. While so incarcerated he entered a guilty plea to unrelated state charges and had been sentenced at the time of entering his federal plea. The state sentence had not yet begun to run, however, because of the federal custody. The District Court, when taking the plea, had no reason to know of these facts which, if appellant's position has any merit at all, should have been made known to the Court by him. Had appellant remained a federal prisoner through sentencing, and gone directly to his federal term, it would be anomalous to suggest that his federal plea would be affected by the fact that he would have the state waiting for him at the conclusion of the federal sentence. Here, however, by

his own motion made after the federal plea, he was released to state custody to serve that term. By virtue of 18 U.S.C. § 3568 [1], he thereby put himself in a position where his federal sentence could not commence until release from the state sentence unless the Attorney General designated the state institution as the place of confinement for the federal term. This is out of the Court's hands. The very Byzantine nature of this process argues convincingly for the proposition that this is exactly the type of collateral consequence where "defense counsel is in a much better position to ascertain the personal circumstances of his client so as to determine what indirect consequences the guilty plea may trigger." *Michel* v. *United States*, 507 F.2d 461 (2 Cir.) 1974. Hermann was adequately advised of the direct consequences of his plea, that is the maximum sentence, and the plea was made with full knowledge of what sentence this Court could impose. It is only the fact and timing of his own desire to be transferred to state custody that provide the shaky foundation of this contrived issue. The Court did properly that which was required of it at the time of the plea.

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[1] The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

If any such person be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

Finally, on a purely factual level, appellant's counsel at disposition argued for a concurrent sentence, which is convincing evidence that he was aware consecutive sentencing was a possibility. *Harris* v. *United States*, 493 F.2d 1213, 1214 (8 Cir.) 1974. In the absence of any direct allegation that appellant was unaware, or misled, it can be conclusively presumed that he had full knowledge that a consecutive sentence could result.

Nonetheless, it is submitted that purely as a matter of law Rule 11, F.R.C.P. does not require advising a defendant facing charges in state and federal courts that the sentence, in the absence of a designation by the Attorney General to the contrary, must be consecutive. This precise issue has not yet been decided in this circuit, and while it is true that the Ninth Circuit has so held, *United States* v. *Myers*, 451 F.2d 402 (9 Cir.) 1972, other circuits have reached the opposite conclusion. *Tindall* v. *United States*, 469 F.2d 92 (5 Cir.) 1972; *Williams* v. *United States*, 500 F.2d 42 (10 Cir.) 1974; *Wall* v. *United States*, 500 F.2d 38 (10 Cir.) 1974, *cert. denied*, — U.S. —. It has also been held that strictly within the federal framework it is not necessary to advise that sentences on separate counts may be consecutive. *United States* v. *Saldana*, 505 F.2d 628 (5 Cir.) 1974; *Johnson* v. *United States*, 460 F.2d 1203 (9 Cir.) 1972, *cert. denied*, 409 U.S. 873; *United States* v. *Vermeulen*, 436 F.2d 72 (2 Cir.) 1970. *United States* v. *Myers*, *supra*, would appear to be an aberration with which even the Ninth Circuit is not comfortable in view of the lack of logical distinction between *Myers* and *United States* v. *Johnson*, *supra*. This Circuit has clearly enunciated the reasoning which should prevail. "In terms of reasonable expectations . . . the penalties for violation of two separate counts arising from two entirely different . . . crimes do not permit an assumption that he would receive but a single punishment." *United States* v. *Vermeulen*, *supra* at 75. This result is even more forcefully compelled when

the charges are pending in entirely separate jurisdictions, as was the case here. Appellant's position is without merit.

CONCLUSION

For the foregoing reasons, appellant's guilty plea was knowingly made with full knowledge of the consequences required by Rule 11, Federal Rules of Criminal Procedure to be made known to him, his sentence thereon was fair and just, and the District Court properly denied his motion to vacate made pursuant to 28 U.S.C. § 2255.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-1059

UNITED STATES OF AMERICA
Appellee

v.

THOMAS JOSEPH HERMANN
Appellant

AFFIDAVIT OF SERVICE BY MAIL

Louis Pinto, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1967n 71st Street Brooklyn, N.Y.

That on the 26th day of June, 1975, deponent served the within Brief for the Appellee upon Alan Neigher, Esq. 855 Main Street Bridgeprot, Connecticut

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Louis Pinto

Sworn to before me,

This 26th day of June 1975

William J. Bachman

WILLIAM J. BACHMAN
Notary Public, State of New York
No. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976